

IN THE MISSOURI SUPREME COURT

SUPREME COURT CASE NO. 86761

STATE OF MISSOURI, ex rel.

DAVID LOE and RICHARD HILL, Sheriff of Stone County, Missouri,

Relators,

v.

THE HONORABLE GEORGE C. BALDRIDGE, Senior Judge, Lawrence

County, Missouri, 39th Judicial Circuit at Mt. Vernon, Missouri,

Respondent.

ORIGINAL PROCEEDING IN MANDAMUS

RELATORS' REPLY BRIEF

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ARGUMENT

Respondent's arguments in opposition in this proceeding fall into three categories. First, respondent claims the Official Immunity Doctrine should be abolished entirely or otherwise limited so that his client can prevail. Second, he argues that the Doctrine of Respondeat Superior should be altered so that a supervisor can be held liable for the actions of a subordinate based on that doctrine. Finally, he claims that evidence exists from which a jury could find that Relator ratified David Loe's actions. Unfortunately for Respondent, each argument fails.

A. The Continuing Viability of the Official Immunity Doctrine

Respondent claims this court *must* abolish, or limit, the official immunity doctrine, claiming it is unfair, and never has been or ever will be fair. However, Respondent does not identify any cases which call into question the continuing validity of the official immunity doctrine. Respondent first cites to Jones v. State Highway Commission, 557 S.W.2d 225, 230 (Mo. banc 1977) for the proposition that official immunity should be abolished. *Jones* discussed, and upheld, the judicial abrogation of sovereign immunity, and was decided September 12, 1977. *Id.* The Missouri Legislature *subsequently* enacted R.S.Mo. 537.600, which restored the doctrine of sovereign immunity to the condition it existed in prior to September 12, 1977. R.S.Mo. 537.600 (West 2005). The Missouri legislature obviously disagreed with the Missouri Supreme Court and reestablished the vitality of the sovereign immunity doctrine. Therefore, to the extent that *Jones* stands for the proposition that immunities from suit have been, and should be,

abolished, that holding has clearly been overruled and superceded by the reestablishment of the doctrine by statute.

Respondent's reference to Kanagawa v. Freeman only reinforces the vitality of the official immunity doctrine. *Kanagawa* held that the defendants were entitled to immunity from suit, without questioning the validity of the doctrine. 685 S.W.2d 831, 837 (Mo. 1985). Furthermore, the *Kanagawa* court noted that where immunities have been abrogated, it has been in narrow and limited factual circumstances. *Id.* at 834-35 (noting that statutory provisions waiving sovereign immunity are strictly construed and narrowly defined). In addition, the official immunity doctrine has been applied in police shooting cases, and such situations have generally been held to be discretionary. *See Murray v. Leyshock*, 915 F.2d 1196, 1201 (8th Cir. 1990) (noting aiming and firing a gun requires judgment, training, and practice, and "withholding immunity in this situation [would be] calamitous.").

The other authorities cited by Respondent do not show that there is a trend nationally, or a local movement, towards abandoning the doctrine of official immunity. Rather, they show that while in limited and narrow factual circumstances certain immunities have been waived or abrogated, and that the official immunity doctrine continues to be a valid doctrine applicable to government officials.

B. Respondent Superior Does Not Allow a Supervisor to be Liable for the Conduct of a Subordinate

As noted in Relator's Brief (p. 16) the doctrine of respondeat superior applies to hold employers, not supervisors, liable for the acts of an employee within the scope of

employment. Respondent cites no legal authority for the proposition that the doctrine also applies to supervisors. As discussed in Relator's Brief, it is undisputed that Sheriff Hill is not David Loe's employer. Therefore, respondeat superior does not apply to hold Sheriff Hill liable in the present case.

C. Respondent has Identified Insufficient Evidence to Show Sheriff Hill Ratified David Loe's Actions.

Respondent claims Sheriff Hill ratified David Loe's actions because Sheriff Hill spoke with officers who were at the scene of the shooting, retained legal counsel to assist in the investigation, and sought assistance from the Missouri Highway Patrol in the investigation. In short, Sheriff Hill took prompt action to investigate the incident. Respondent relies on these actions to show that Sheriff Hill ratified David Loe's actions. If investigating a police shooting by the superiors of the police officers involved is sufficient to ratify the conduct and therefore fall within the exception to official immunity, then every supervisor would potentially be liable for the conduct of the officers they supervise, *without regard to whether the supervisor agreed with the subordinate's conduct, or whether the subordinate officers followed, or violated, department policy.*

Police investigations are discretionary functions. Beaver v. Gosney, 825 S.W.2d 870, 874 (Mo. App. W.D. 1992). Respondent would allow Sheriff Hill to be held liable because of his discretionary conduct in the process of investigating the discretionary conduct of a subordinate. If errors occurred in the incident itself, or in the investigation of the incident, such errors cannot form the basis for liability because they arise out of

discretionary conduct. Therefore, the investigation of a police shooting, standing alone, is insufficient to fall within the exception to the official immunity doctrine. To withhold immunity in this case will decrease the effectiveness of law enforcement and encourage police officials to do nothing to investigate incidents that occur between private citizens and police officers.

Sheriff Richard Hill did not cause or contribute to cause the death of Charles Kuyper. Any association Relator had with the events of the evening of June 4, 2001, were as a result of the exercise of his discretionary capacity as a supervisor of the deputy sheriffs of Stone County, Missouri. Therefore, Relator is immune from allegations of negligence related to the exercise of those discretionary duties.

CONCLUSION

WHEREFORE, Relators respectfully request this Court make permanent its preliminary Writ of Mandamus directing Respondent to enter an Order granting Relators' Motion for Summary Judgment.

Respectfully submitted,

/s/ Peter A. Lee

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CERTIFICATE OF COMPLIANCE AND FILING

The undersigned certifies that two (2) complete copies of Relators' Reply Brief were served on counsel of record Richard L. Anderson, Attorney for Respondent, P.O. Box 2145, Branson West, Missouri 65737-2145; The Honorable George C. Baldrige, Judge, P.O. Box 426, Joplin, Missouri 64802; and Richard Crites, Richard D. Crites & Associates, 2045 S. Glenstone Avenue, Suite 201, Springfield, Missouri 65804, by U.S. mail, postage prepaid, this 18th day of October 2005.

Further, the undersigned certifies that: (1) Relators' Reply Brief complies with the limitations contained in Special Rule Number 1(b); (2) excluding the cover, certification of service/compliance, signature block and appendix, there are 906 words in Relators' Reply Brief; (3) the name and version of the word processing software used to prepare Relators' Reply Brief is Microsoft Word 2002; and, (4) the diskette provided to this court has been scanned for viruses and is virus free.

/s/ Peter A. Lee

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